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#### **UNITED STATES DISTRICT COURT** **NORTHERN DISTRICT OF CALIFORNIA**

1           ANIBAL RODRIGUEZ, SAL CATALDO,  
 2           JULIAN SANTIAGO, and SUSAN LYNN  
 3           HARVEY individually and on behalf of all  
 4           other similarly situated,

5           Plaintiffs,

6           vs.

7           GOOGLE LLC,

8           Defendant.

9           Case No.: 3:20-cv-04688-RS

#### **PLAINTIFFS' RESPONSE TO** **GOOGLE'S STATEMENT IN SUPPORT** **OF MOTION TO SEAL (DKT. 339)**

10          Judge: Hon. Richard Seeborg  
 11          Courtroom 3 – 17th Floor

1           Google asserts that it “has narrowed the material it seeks to keep under seal” (Dkt. 339 at  
 2 1) in connection with Plaintiffs’ motion for class certification and Google’s motion to exclude Mr.  
 3 Lasinski’s opinions and testimony, but its sealing request remains far too broad. In the briefing  
 4 alone, Google seeks to redact material that would inform absent class members of their potential  
 5 recovery; evidence that Google knew users expected Google not to collect, save, and use (s)WAA-  
 6 off app activity data; equally high-level descriptions of the ways in which Google profits from  
 7 (s)WAA-off app activity data; and high-level summaries of the information that Google collects  
 8 about class members’ (s)WAA-off app activity. For these reasons, Plaintiffs respectfully oppose  
 9 certain portions of Google’s motion to seal. The specific portions be found in Plaintiffs’ motion for  
 10 class certification, and Plaintiffs’ opposition to Google’s *Daubert* motion. Where applicable,  
 11 Plaintiffs below identify the page and row of Google’s proposed order for which Plaintiffs oppose  
 12 sealing.<sup>1</sup>

13           The public has a “right of access to civil proceedings and associated records and  
 14 documents.” *Wood v. Ryan*, 759 F.3d 1076, 1081-82 (9th Cir. 2014), *vacated on other grounds*,  
 15 135 S. Ct. 21 (2014). That right is especially strong in the context of a putative class action because  
 16 the information that Google seeks to maintain under seal may affect the substantive rights of the  
 17 millions of Americans who are also absent class members. For at least the following types of  
 18 information, Google fails to offer any reason “compelling” enough to “overcom[e] th[e] strong  
 19 presumption” in favor of public access, *Kamakana v. City & County of Honolulu*, 447 F.3d 1172,  
 20 1178 (9th Cir. 2006):

21           **Information pertaining to total monetary relief:** Google improperly seeks to redact  
 22 Plaintiffs’ expert’s calculation of Google’s unjust enrichment from its use of (s)WAA-off app  
 23 activity data and the amount of the classes’ actual damages. *See* Class Cert. Mot. at 19-20. Google

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 25           <sup>1</sup> This exercise is made more difficult by the fact that Google’s sealing submission does not comply  
 26 with the Local Rules. While Google has proposed extensive redactions to Plaintiffs’ brief in  
 27 support of class certification (Dkt. 341-18), Google did not include any corresponding row in either  
 28 its motion to seal nor proposed order. *See* L.R. 79-5(c)(3) (party moving to seal must submit “a  
 proposed order that is narrowly tailored to seal only the sealable material, and which lists in table  
 format each document or portion thereof that is sought to be sealed” (emphasis added)).

1 fails to explain how it would be harmed if the public were to learn Mr. Lasinski's conclusions, as  
 2 opposed to the inputs to his analysis. On the other hand, this information is important to the classes,  
 3 who are entitled to learn the profits that Google earned from their data—and the recovery they  
 4 might obtain from a favorable judgment.

5       **Information pertaining to allocation of monetary relief:** Google inexplicably seeks to  
 6 redact information pertaining to Mr. Lasinski's proposed methods of allocation. *See* Class Cert.  
 7 Mot. 21. With this information, absent class members could better understand the factors that will  
 8 determine the size of their recovery. And if coupled with information concerning the total  
 9 monetary relief available, class members may also be able to estimate their expected recovery.  
 10 Google fails to explain how it would be harmed by the disclosure of Mr. Lasinski's proposals  
 11 regarding allocation.

12       **Information pertaining to calculation of monetary relief:** Google improperly seeks to  
 13 seal high-level summaries of Mr. Lasinski's methodology—including portions that form the basis  
 14 of Google's motion to exclude Mr. Lasinski's opinions. *See, e.g.*, Class Cert. Mot. 20, Daubert  
 15 Opp. 4 (Google proposed order, Dkt. 339-2 at 30, Row 2). These methodologies are not sensitive,  
 16 and they may be important to the Court's reasoning. The parties also discussed Mr. Lasinski's  
 17 methodology during the public hearing on class certification.

18       **Information pertaining to Google's approach to user privacy:** Google also improperly  
 19 seeks to seal information reflecting that its own employees and executives have long known that  
 20 users expect turning (s)WAA off to stop Google's collection of app activity data. *See, e.g.*, Class  
 21 Cert. Mot. 12:18-19. Google also seeks to seal information reflecting its own dubious approach to  
 22 matters of user privacy. *See, e.g.*, Class Cert. Mot. 15:15-17. And similarly, Google seeks to seal  
 23 the ways in which Google conceals its conduct from its users. *See, e.g.*, Class Cert. Mot. 2:20-22,  
 24 11:14-15. This evidence may be embarrassing, but its disclosure would not jeopardize Google's  
 25 "competitive standing." *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1097 (9th  
 26 Cir. 2016).

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1           **Information pertaining to the (s)WAA-off app activity data that Google collects,**  
 2 **saves, and uses:** Google seeks to seal high-level summaries of the app activity data that Google  
 3 collects from class members. *See* Class Cert. Mot. 13. This position is especially untenable because  
 4 Plaintiffs took care to describe the information Google collects at a high level, without mentioning  
 5 names of bits, logs, or much of the detailed information that Google collects. Google also seeks to  
 6 seal Plaintiffs' expert's conclusion that the data that Google collects contravenes even *Google's*  
 7 position on the scope of permission granted. Absent class members are entitled to know what  
 8 Google is collecting from them, and Google's position on sealing is inconsistent with its  
 9 substantive position in this litigation.

10           **Information pertaining to the ways in which Google profits from (s)WAA-off app**  
 11 **activity data:** Google also seeks to seal basic information about the ways it uses (s)WAA-off app  
 12 activity data for profit. These include, but are not limited to, the two uses that informed Mr.  
 13 Lasinski's opinions on unjustly earned profits. Plaintiffs and Google have both discussed these  
 14 uses in open court, and Google's redactions are inconsistent from brief to brief, and even sentence  
 15 to sentence. *See* Class Cert. Mot. 20; Daubert Opp:17-20, Daubert Opp. 14:20-24 (Google  
 16 proposed order, Dkt. 339-2 at 30, Row 6).

17           Google has failed to articulate any legitimate (let alone compelling) reason to prevent the  
 18 public—and millions of absent class members—from learning at least this information, if not  
 19 more. Pursuant to Rule 79-5, Plaintiffs respectfully request that Google's request to seal this  
 20 information be denied.

21 Dated: October 16, 2023

Respectfully submitted,

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